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No. 92-700

IN THE

# Supreme Court of the United States

October Term, 1992

LUCILLE R. KAUFFMAN,
*Petitioner,*

vs.

ALLIED-SIGNAL INC., AUTOLITE DIVISION,
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## RULE 29.1 STATEMENT

There is no parent or subsidiary company to be listed.

## TABLE OF CONTENTS

RULE 29.1 STATEMENT ..... i

TABLE OF CITATIONS ..... iv

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE WRIT ..... 3

I. The Questions Presented Are Not Ripe For Review ..... 3

II. There Is No Conflict Among The Federal Circuit Courts As To When An Employer Is Liable For Hostile Environment Sexual Harassment Perpetrated By A Supervisor ..... 4

III. The Standards Applied By The Federal Circuits Are Consistent With The Holding In *Meritor Savings Bank* ..... 8

A. Notice ..... 9

B. Prompt and adequate remedial action ..... 10

IV. There Is No Inconsistency In The Standard Applied By The Lower Courts In Sex Harassment Cases As Compared To Race/Religion/National Origin Harassment Cases ... 11

V. This Is Not An Appropriate Case To Address The Issues Presented ..... 12

CONCLUSION ..... 13

## TABLE OF CITATIONS

---

**Cases Cited:**

*Andrews v. City of Philadelphia*, 895 F.2d 469 (3rd Cir. 1990) ..... 6,9,12

*Arnold v. United States*, 263 U.S. 427 (1923) ..... 3

*Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327 (1967) ..... 3

*California v. Rooney*, 483 U.S. 307 (1987) ..... 3,4

*Conway – v. California Adult Authority*, 396 U.S. 107 (1969) ..... 12

*E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1988) ..... 5,7,9,10

*Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988) ..... 5,9

*Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572 (10th Cir. 1990) ..... 5,7,9,10

*John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82 (1922) ..... 3

*Jones v. Wesco Investments, Inc.*, 846 F.2d 1154 (8th Cir. 1988) ..... 7,9

*Kauffman v. Allied-Signal Inc.*, 970 F.2d 178 (6th Cir. 1992) ..... 5,7,9,10

*Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2nd Cir. 1992) ..... 6

*Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976 (1989) ..... 3

*Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) ..... 6,9

*Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184 (2d Cir. 1987) ..... 12

*McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971) ..... 12

*Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986) ..... *passim*

*Minnick v. California Department of Corrections*, 452 U.S. 105 (1981) ..... 3

*North v. Madison Area Association for Retarded Citizens*, 844 F.2d 401 (7th Cir. 1988) ..... 6,7,12

*Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989) ..... 6

*Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) ..... 11

*Ramsey v. New York*, 440 U.S. 444 (1979) ..... 12

*Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) ..... 3,4

*Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475 (6th Cir. 1989) ..... 11

*Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987) ..... 5

*Steele v. Offshore Ship Building Inc.*, 867 F.2d 1311 (11th Cir. 1989) ..... 7

*Swentek v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987) ..... 9

*Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503 (11th Cir. 1989) ..... 12

*Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989) ..... 6,9

*Watson v. Fort Worth Bank and Trust*, 487 U.S. 978 (1988) ..... 11

**Other Authorities Cited:**

EEOC Compliance Manual §615.7 ..... 11

*Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 St. Louis U.L.J. 239, 276 (1987) ..... 5

Restatement (Second) of Agency §219(2) (1958) ..... 4,5,7

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### STATEMENT OF THE CASE

The case arises out of the offensive conduct of an Allied-Signal Inc. ("Allied") supervisor over a three day period in April, 1988. The supervisor had no history of such conduct (Dist. Ct.Op., A.22a, 31a).[1] When Allied learned about the conduct, it immediately confronted and terminated the offending supervisor (Ct.App.Op., A.3a, Dist.Ct.Op., A.21a).

[1] References are to the Court of Appeals Opinion (Ct.App.Op.) or to the District Court Opinion (Dist.Ct.Op.) which appear in the Appendix (A.) to the Petition.

Since at least 1981, Allied has had a written policy against sexual harassment (Ct.App.Op., A.3a; Dist.Ct.Op., A.22a). The policy urges employees to present complaints about sexual harassment to management through the employee relations department (*Id*). Although Petitioner claims she was unaware of the policy, Allied's policy against sexual harassment is posted throughout the plant (Ct.App. Op., A.4a). Allied's policy against sexual harassment was the subject of "special" meetings with supervisors before 1986 and was discussed thereafter with supervisors on many occasions (*Id;* Dist.Ct.Op., A.31a).

Allied's hourly employees, such as Petitioner, are also protected by a collective bargaining agreement between Allied and United Auto Workers, Local 533 (Ct.App.Op., A.3a-4a; Dist.Ct.Op., A.21a-22a). The collective bargaining agreement prohibits sexual harassment and establishes a grievance procedure through which employees can pursue complaints of sexual harassment (*Id*). Union officials assist employees with grievances and complaints (*Id*).

On April 11, 1988, the supervisor made offensive remarks to Petitioner respecting her breast enlargement surgery (Ct.App.Op., A.2a; Dist.Ct.Op., A.20a). On April 12, 1988, the supervisor reassigned Petitioner to a different machine for the day (Ct.App.Op., A.3a; Dist.Ct.Op., A.20a-21a). On April 13, 1988, the supervisor threw a spark plug insulator at the Petitioner (*Id*).

On April 13, 1988, Petitioner contacted her union representatives and they prepared a written statement of the events (*Id*). The written statement was presented to Allied's director of employee relations who immediately confronted and terminated the supervisor (*Id*).

## REASONS FOR DENYING THE WRIT

### I. The Questions Presented Are Not Ripe For Review.

Petitioner presented two alternative theories of liability to support her Title VII claim: hostile work environment and quid pro quo. *See Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65-66 (1986). Although the court of appeals rejected Petitioner's hostile work environment theory, it reversed the district court's dismissal of her quid pro quo theory and remanded the case for further proceedings relating to that claim. *Id.* at p. 18a. Petitioner could, therefore, still obtain a judgment in her favor under Title VII.

Because the judgment below is not final,[2] the case is not yet ripe for review by writ of certiorari. *California v. Rooney*, 483 U.S. 307, 311-14 (1987); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967); *Arnold v. United States*, 263 U.S. 427, 432-34 (1923). *See also John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82, 88-89 (1922) (Court of appeals decision that requires further proceedings in the district court before any final judgment is rendered is not ripe for supreme court review); *cf. Minnick v. California Department of Corrections*, 452 U.S. 105, 120-24 (1981) (Court will avoid granting certiorari to review state court decisions when further proceedings in state courts are contemplated).

The Court generally should avoid granting certiorari in a case such as this, "when time may further illumine or completely outmode the issue[s] in dispute." *Rice v.*

[2] An order or judgment is not "final" until it ends the litigation on the merits, and there are no further proceedings possible except for carrying the judgment into effect. *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976, 1978 (1989); *Arnold v. United States*, 263 U.S. 427, 432-34 (1923).

*Sioux City Memorial Park Cemetery*, 349 U.S. 70, 77 (1955). If Petitioner ultimately loses her Title VII claim in the lower courts and chooses to petition the Court again, she may at that time raise the same questions. *California v. Rooney*, *supra*, 483 U.S. at 313.

**II. There Is No Conflict Among The Federal Circuit Courts As to When An Employer Is Liable For Hostile Environment Sexual Harassment Perpetrated By A Supervisor.**

Petitioner contends that the Sixth Circuit's standard for holding an employer liable for hostile environment sexual harassment by a supervisor conflicts with standards developed by other federal courts of appeals. There is no such conflict. Although the courts employ different language, they have in fact developed and applied uniform standards of liability. These standards are consistent with the directives this Court issued in *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

*Meritor Savings Bank* rejected the proposition that employers are strictly liable for hostile work environments created by supervisors. Rather than issuing a "definitive rule" on employer liability, the Court directed lower courts to consider the circumstances of the particular case and to employ agency principles for guidance. The Court recognized, however, that those principles are not "transferable in all their particulars to Title VII." 477 U.S. at 72.

Guided by the principles of the Restatement of Agency, the courts since *Meritor Savings Bank* have identified several possible bases for holding an employer liable for a hostile or offensive work environment created by a supervisor. The employer may be liable if (1) the harassment was within the supervisor's scope of

employment;[3] (2) the supervisor purported to act on behalf of the employer and had apparent authority to engage in the offending conduct or was aided in accomplishing the harassment by the existence of the agency relation;[4] (3) the employer was negligent or reckless. *See Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572, 576-77 (10th Cir. 1990) (quoting Restatement (Second) of Agency §219(2) (1958) hereinafter "Restatement").

In most cases, employees seek to hold employers liable for their own negligence in "failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Hirshfeld*, 916 F.2d at 577; *Kauffman v. Allied-Signal, Inc.*, 970 F.2d 178, 185 (6th Cir. 1992); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1988).[5] All of the circuits that have addressed the issue since *Meritor Savings Bank* have applied this standard.

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[3] Most courts that have addressed the issue recognize that the "scope of employment" test is "largely inapposite in sexual harassment cases because 'sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business.' " *Hirschfeld*, 916 F.2d at 576 (quoting Holtzman & Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 St. Louis U.L.J. 239, 276 (1987)).

[4] Because supervisors also do not generally purport to act on behalf of their employers when harassing employees, liability is not generally imposed under the apparent authority standard. *But see Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1560 (11th Cir. 1987) (where employer had no policy against sexual harassment and no avenue for complaint, supervisor may have had apparent authority to harass employee).

[5] Some courts use the term "respondeat superior" to describe the standard of employer liability. Use of that label is not technically accurate when the employer is held directly liable for its own negligence, rather than derivatively liable for its agent's conduct. The respondeat superior and negligence standards are, however, the same. *See Hirschfeld*, 916 F.2d at 577, n.5; *Hall v. Gus Construction Co.*, 842 F.2d at 1010, 1015 (8th Cir. 1988).

- **First Circuit**: *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988) (employer is liable if officials knew or, in the exercise of reasonable care, should have known, of harassment, "unless that official can show that he or she took appropriate steps to halt it.");
- **Second Circuit**: *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2nd Cir. 1992) ("plaintiff must prove that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it");
- **Third Circuit**: *Andrews v. City of Philadelphia*, 895 F.2d 469, 486 (3rd Cir. 1990) ("liability exists where the [employer] knew or should have known of the harassment and failed to take prompt remedial action");
- **Fourth Circuit**: *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989) (employer is liable if it had "actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action");
- **Fifth Circuit**: *Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (employer is liable if it had actual or constructive knowledge of harassment and failed to take prompt remedial action);
- **Seventh Circuit**: *North v. Madison Area Association for Retarded Citizens*, 844 F.2d 401, 407 (7th Cir. 1988) (in absence of apparent authority to harass, employer is liable for discriminatory actions

attributable to supervisor "only if it knew or should have known of those actions and failed to take reasonable remedial measures"[6]);

- **Eighth Circuit:** *Jones v. Wesco Investments, Inc.*, 846 F.2d 1154, 1156 (8th Cir. 1988) (employer is liable in hostile environment cases where it "knew or should have known of the harassment in question and failed to take proper remedial action");
- **Ninth Circuit:** *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) ("employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care, should have known");
- **Tenth Circuit:** *Hirschfeld*, 916 F.2d at 577 (10th Cir. 1990) (employer is liable for "failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew or in the exercise of reasonable care should have known");
- **Eleventh Circuit:** *Steele v. Offshore Ship Building Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (liability in hostile environment cases "exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.").

The Sixth Circuit's decision in *Kauffman* is consistent with these cases and the Restatement. Although the court appeared to combine the elements of

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[6] The *North* case involved racial, rather than sexual harassment. The court indicated, however, that its conclusions would apply to any claim under Title VII in which employer liability was an issue. *See* 844 F.2d at 407, n.7.

the different tests, the result would not be different if it analyzed the issues separately.[7]

The purported "conflict" among the courts of appeals on this issue is illusory. Following this Court's lead, the courts of appeals have developed standards that recognize the various bases for imposing liability upon employers for their supervisors' conduct. Contrary to Petitioner's suggestion, there cannot be any one formula that applies in all cases.

**III. The Standards Applied By The Federal Circuits Are Consistent With The Holding In Meritor Savings Bank.**

Apparently conceding that the circuit courts have developed consistent standards, Petitioner asks the Court to intervene to dismantle "judicially constructed barriers" to sexual harassment claims. According to Petitioner, the issues of notice and adequate response are not relevant to the analysis of an employer's liability for sexual harassment. Employers should be liable, Petitioner contends, whenever they fail to prevent sexual harassment by supervisors. In other words, Petitioner contends that employers should be strictly liable for supervisors' actions.

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[7] The Sixth Circuit interpreted the scope of employment test very broadly and thus incorporated some of the negligence issues into its analysis. Most courts would find that the conduct of Allied's supervisor was not within the scope of his employment because Allied had an explicit and effective policy against sexual harassment that divested its supervisors of actual and apparent authority to harass employees. *See Meritor Savings*, 106 S. Ct. at 2408-09. Liability could not be imposed under the negligence standard, however, because once Allied was notified of the supervisor's conduct, Allied's remedial action was both prompt *and* effective. The result is, therefore, the same.

This Court addressed and unequivocally rejected in *Meritor Savings Bank* the arguments Petitioner raises. There is no reason to revisit these issues.

### A. Notice

Petitioner contends that the "knew or should have known" standard applied by the circuit courts contravenes this Court's holding in *Meritor Savings Bank*. Petition at 18-19. Petitioner argues that this Court abrogated any notice requirement when it stated that "absence of notice to an employer does not necessarily insulate that employer from liability" for harassment by a supervisor. Petition at 19 (quoting *Meritor Savings Bank*, 477 U.S. at 72). The Court did not do so; it merely recognized that in certain circumstances an employer could be liable for a supervisor's harassment without actual notice.

None of the cases Petitioner cites make actual notice a prerequisite to an employer's liability for a supervisor's improper conduct. Under the negligence standard, an employer can be liable if the employer "should have known" or had "constructive knowledge" of the offensive conduct.[8] *See Kauffman*, 970 F.2d at 184 (6th Cir. 1992); *Lipsett*, 864 F.2d at 901 (1st Cir. 1988); *Andrews*, 895 F.2d at 1486 (3rd Cir. 1990); *Swentek v. USAIR, Inc.*, 830 F.2d at 558 (4th Cir. 1987); *Jones*, 793 F.2d at 720 (5th Cir. 1986); *Gus Const.*, 842 F.2d at 1015 (8th Cir. 1988); *Hacienda Hotel*, 881 F.2d at 1515-16 (9th Cir. 1988); *Hirschfeld*, 916 F.2d at 577 (10th Cir. 1990).

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[8] Employees can demonstrate constructive notice by "showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Waltman*, 875 F.2d at 478 (5th Cir. 1989). *Accord Swentek*, 830 F.2d at 558. In this case, Allied did not know and had no reason to know of the supervisor's conduct (Ct.App.Op., A.5a, 13a).

The courts have also not required actual notice under the "scope of employment" test. They have merely recognized that conduct generally must be foreseeable to be within the scope of employment. *See Kauffman*, 970 F.2d at 184.

**B. Prompt and adequate remedial action**

Petitioner claims that the decision below effectively relieves employers of any duty to prevent sexual harassment, as long as they take corrective action when improper conduct comes to their attention. Petition at 21. Petitioner misreads both the opinion below and the negligence standard.

As noted above, liability may be imposed upon an employer for its own negligence when it fails to remedy or to *prevent* a hostile offensive environment. *See Kauffman*, 970 F.2d at 185; *Hirschfeld*, 915 F.2d at 577; *Hacienda Hotel*, 881 F.2d at 1516. The court below considered and rejected Petitioner's claim that Allied negligently failed to prevent the harassment:

> These claims of negligence and inadequate policy are not supported by the record. Whatever one may think about the adequacy of Allied's sexual harassment policy, *ex ante*, it worked and was adequate in this situation. Allied immediately fired the offending supervisor to correct the hostile working environment which he created.

*Kauffman*, 970 F.2d at 185.

Having failed to prove that Allied was negligent in allowing the harrassment to occur, Petitioner seeks to change the law and to hold Allied liable simply because the harassment occurred. This Court has properly rejected such strict liability.

**IV. There Is No Inconsistency In The Standard Applied By The Lower Courts In Sex Harassment Cases As Compared To Race/Religion/National Origin Harassment Cases.**

Petitioner contends that an "inconsistency" has developed in the standards for sexual harassment cases and in cases involving harassment due to race/religion/national origin. Petition at pp. 23-24. She argues that "in all other Title VII contexts, save sexual harassment, courts do not consider intervening factors as barriers to employer liability for a supervisor's acts of discrimination." *Id.* (*citing Watson v. Fort Worth Bank and Trust*, 487 U.S. 978, 990-91 (1988)).

*Watson* does not stand for the proposition cited, nor does Petitioner cite any post-*Meritor Savings Bank* decisions that purport to apply different standards. No such inconsistency exists in the circuit court decisions. Indeed, the Sixth Circuit itself has unequivocally rejected the notion that hostile work environment cases are to be analyzed differently depending on whether the claims are based on sex as opposed to race. *See Risinger v. Ohio Bureau of Worker's Compensation*, 883 F.2d 475, 483-85 (6th Cir. 1989) (*citing Meritor Savings Bank, Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), and EEOC Compliance Manual §615.7).

Because there is no apparent conflict among the circuits, and because the Sixth Circuit itself does not use a different analytical framework depending upon the category of discrimination, this is not an appropriate case for the Court to address the issue.

**V. This Is Not An Appropriate Case To Address The Issues Presented.**

The Petition should also be denied because Petitioner asks this Court to render an advisory opinion. To be actionable under a "hostile work environment" theory, the sexual harassment "must be sufficiently *severe or pervasive* . . . ." *Meritor Savings Bank*, 477 U.S. at 67. The federal courts of appeals agree that to be "pervasive" there must be repeated and continuous acts of harassment directed to the employee. *e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3rd Cir. 1990); *North v. Madison Area Ass'n for Retarded Citizens*, 844 F.2d 401, 408-09 (7th Cir. 1988); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189-90 (2d Cir. 1987). One must look not only to the frequency of the incidents, but also to the gravity of the incidents. *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503, 1510-11 (11th Cir. 1989).

The only acts alleged were: (1) a single conversation with Petitioner; (2) temporarily reassigning Petitioner to another machine; and (3) throwing a spark plug insulator at Petitioner. These three acts took place within a three-day period.

These acts, although offensive, are insufficient to meet the "severe and pervasive" requirement of a hostile work environment. The record in this case "does not adequately present" the issues asserted. *Ramsey v. New York*, 440 U.S. 444 (1979); *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971); *see Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969). The questions presented are "purely artificial and hypothetical" and would result in the Court rendering merely an advisory opinion. *Conway v. California Adult Authority*, 396 U.S 107, 110 (1969).

## CONCLUSION

The federal circuits have uniformly applied standards for determining liability in sexual harassment cases consistent with the directions of *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986). These standards are consistent with the standards for determining liability in other Title VII cases. There is no conflict among the circuits.

The Petition should also be denied because final judgment has not been entered on Petitioner's Title VII claim, and because this case does not present appropriate facts to address the questions presented.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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